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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 485

RAYMOND P. WARD,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals of March 12, 1959, including the concurring and dissenting opinions, is reported at 265 F.2d 75, and is reproduced at R. 159-179. The United States District Court for the Northern District of Florida did not render an opinion, and its final judgment was not reported but is reproduced at R. 158.

Jurisdictional Statement

The judgment of the United States Court of Appeals was entered March 12, 1959 (R. 179). Petition for a writ of certiorari was filed on June 10, 1959, and was granted on October 19, 1959 (R. 180). The jurisdiction of the United

States District Court was invoked under the Federal Employers' Liability Act, 45 U.S.C., Section 56 and under 28 U.S.C., Sections 1331 and 1332 (a)(1). The jurisdiction of the United States Court of Appeals was invoked pursuant to 28 U.S.C., Section 1291. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Statutes Involved

This case arises under and involves the Federal Employers' Liability Act, 45 U.S.C., Sections 51 et seq. More particularly involved are Sections 51 and 55, which read as follows:

45 U.S.C., Section 51:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate

or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404."

45 U.S.C., Section 55:

"Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, Sec. 5, 35 Stat. 66."

Questions Presented

Question I.

Where a Railroad by contract obligates a Customer to maintain to the satisfaction of the Railroad's chief engineer a spur track built by the Railroad partly on the Customer's property and used by the Railroad in interstate commerce to service several customers in the area, and where the Customer, on being advised by the Railroad's section foreman that the track is defective, purports to hire the foreman and his regular Railroad section crew to fix the track to satisfy the Railroad on Saturday at time-and-one-half

their Railroad rate of pay, the crew using their regular Railroad tools to perform the work and working under the supervision of their regular section foreman, does the Railroad as a matter of law continue in its employer-employee relationship to its section crew while so engaged under the Federal Employers' Liability Act or is it relieved of liability under such Act by virtue of such arrangement?

QUESTION II.

Where the principal issue involved in a Federal Employers' Liability Act suit is whether or not the plaintiff (a regular Railroad employee) was working for the Railroad at the time of his injury or was working for the Railroad's Customer, and where the evidence is in dispute as to whether the plaintiff had voluntarily agreed to work for the Customer in repairing a spur track where he was hurt, was it error for the trial court to refuse to charge the jury concerning the usual criteria of employment (e.g., power to control, the furnishing of tools, payment of wages, etc.) and instead to limit the jury's consideration on the employment issue solely to whether or not the plaintiff voluntarily accepted work on the spur track after being advised that if he did so, he would be working for the Customer and not the Railroad, thereby precluding the plaintiff from contending and the jury from finding according to the evidence that the Railroad was the actual employer in control and that the Customer was a mere agent for the Railroad in accomplishing the work with regular Railroad employees?

Statement of the Case

Introduction. Petitioner was plaintiff and appellant below and may sometimes herein be referred to by those terms. Respondent may be referred to as the defendant Railroad or appellee. All emphasis in quoted matter herein is supplied by the writer unless otherwise noted. References to the printed record will be referred to by the symbol "R" and any references to the original typewritten record as transmitted to this Court will be referred to by the symbol "T". For the sake of brevity, the Federal Employers' Liability Act, 45 U.S.C., Section 51 et seq., will hereinafter be referred to as FELA.

Lower Court Proceedings. This suit was originally brought by petitioner on April 30, 1957, against the respondent Railroad under FELA in the United States District Court for the Southern District of Florida, in which District the petitioner then resided (R. 1). The suit claimed damages for injuries allegedly suffered on May 22, 1954, by petitioner while working for the defendant Railroad on a railroad track (R. 1-3). Specifically, plaintiff claimed that his back had been permanently damaged as a result of the defendant Railroad's failure to provide a safe place to work and in requiring the plaintiff to do heavy lifting in an unsafe manner and without adequate help (R. 1-3).

On defendant's motion (R. 3-4), the case was transferred to the Northern District of Florida (R. 7),[1] and there came

[1] Respondent has specifically designated its affidavit in support of its motion to transfer for printing (R. 4-6). Since the ruling on the motion to transfer is not here urged as error, petitioner did not designate its counter affidavit to be printed (T. f-1). Suffice it to say that respondent's affidavit was controverted, and that as a consequence of the transfer, petitioner had to present part of his case by depositions whereas the Railroad was enabled to present its entire case by live witnesses.

on for trial on December 3, 1957, before a jury of eleven members[2] and Judge Dozier A. DeVane (R. 9). At the conclusion of the trial and after receiving the Court's charge, the jury returned a verdict for the defendant Railroad upon which judgment was entered on December 5, 1957 (R. 153, 156-158). Thereafter, the United States Court of Appeals for the Fifth Circuit affirmed the judgment by a divided Court, Circuit Judge Rives dissenting (R. 159-179). This Court granted petitioner's motion for leave to proceed in forma pauperis and his petition for a writ of certiorari on October 19, 1959 (R. 180).

In the trial Court the principal issues litigated concerned the defendant Railroad's alleged negligence[3] and the question of whether or not the plaintiff was injured during the course of his employment with the Railroad. On the employment issue, the plaintiff requested both a peremptory charge that he was employed by the defendant Railroad as a matter of law when injured (R. 155, 141, 143), and alternatively a charge concerning the various factors which the jury should consider in determining by whom the plaintiff was employed when injured, such as the power to control and supervise the work (R. 154-155, 141, 143). All

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[2] In the process of selecting a jury at Gainesville, Fla., the jury panel was exhausted, and the parties stipulated to a trial before an abbreviated jury of eleven jurors (R. 9).

[3] The evidence concerning the Railroad's negligence has not been included in the printed record and is not here material. In brief summary, the plaintiff contended that he was required to hoist railroad ties weighing up to 250 pounds (R. 65, 32, 118), and to slide or swing these ties between his legs while bent over with his head down looking through his legs at the track behind him (R. 17-18, 61-62, 116). An expert safety engineer testified that not only was such a load too great for one man, but that the bent over position required made the lifting most hazardous to the worker's back (T. 82-105, 87). The Railroad contended that the method used was the customary one employed by it for years. See *Urie v. Thompson* (1949), 337 U.S. 163, 178.

such requested charges were denied (R. 141), and due exception was taken to the denial by plaintiff (R. 143). Thereafter, the employment issue was submitted to the jury by the Judge solely on the basis of whether or not the plaintiff's regular Railroad foreman, in asking the section gang to work on the track, had told them either the day before, or just prior to their beginning work that morning, that they were not working for the Railroad but for somebody else (R. 145-146, 152-153).

In the Court of Appeals, petitioner's two principal contentions[4] were the same two points here presented by the petition for a writ of certiorari: (1) that on the undisputed facts, petitioner was as a matter of law an employee of the Railroad when injured regardless of what his foreman told him the day before or that morning; and in the alternative, (2) that the trial Judge erred in refusing to charge the jury concerning the usual criteria governing whether or not an employer-employee relationship exists and in submitting the case to the jury solely on the theory that what the foreman told the gang absolutely governed their relationship. The Court considered both points extensively and determined each adversely to petitioner (R. 162-178). Circuit Judge Rives dissented on the ground that under the decision of this Court in *Sinkler* v. *Missouri-Pacific R. Co.* (1958), 356 U.S. 326, the Railroad's customer was the Railroad's agent insofar as it had obligated itself to maintain the spur track to the satisfaction of the Railroad, and that

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[4] The other points considered by the Court of Appeals but not here involved were (a) whether or not the trial court erred in granting the motion to transfer the case from the Southern District of Florida, Miami Division, to the Northern District of Florida, Gainesville Division, and (b) whether or not the appeal was timely where the notice of appeal was received at the clerk's office on time but was not marked as filed until two days late due to the absence of the clerk from the office on annual leave. The Court ruled the transfer was proper and the appeal timely.

accordingly the plaintiff was an employee of the Railroad as a matter of law regardless of whether he was given to understand that he was working for the Railroad or the customer at the time of injury (R. 178-179).

Statement of Facts. Petitioner was a regular, full-time member of one of respondent Railroad's section crews working in Levy County, Florida (R. 11, 52-53). The section crew or gang consisted of four colored laborers, an apprentice foreman (who was petitioner), and a section foreman (R. 11, 52-53, 17). This gang helped the section foreman perform his duties for the Railroad, which were officially described in the Railroad's rule book as follows (Pl. Ex. #1; R. 12, 13-14):

> "They [section foremen] will have charge of maintenance of their assigned sections, and are responsible for the proper inspection and safety of tracks, bridges and trestles (including those privately owned), culverts and station grounds. They must direct the work of employees under their supervision and see that they perform their duties properly." Rule 1046.

The crew regularly worked 40 hours from Monday through Friday of each week, but were subject to emergency call during the weekends (R. 54, 72-73), and were paid time-and-one-half for any such over-time work (R. 67, 14, 16, 21, 56-57).

Included in the section of respondent's system where this crew worked was a side or spur track which tied into the Railroad's main line and was known as the "McKenzie siding" (Pl. Exs. ##4 and 5; R. 80-81; R. 11-12, 14, 35, 29). Approximately 150 feet of this spur track was owned by the Railroad, and the remaining 1350 feet was owned by one of the Railroad's customers, the M. & M. Turpentine

Company, and ran over land belonging to the president and owner of that company, D. P. McKenzie (R. 96-97, 80, 82, 63). The spur track had originally been built by the Railroad, and the Railroad had charged its customer, the M. & M. Turpentine Company, for the cost of building that part belonging to it (R. 96-97, 100). In addition, the Railroad obligated its customer to maintain the portion of the track which it owned "to the satisfaction of the Railroad's Chief Engineer" (R. 97, 54-55, 64).[5] It was stipulated that the Railroad used the spur track in interstate commerce (R. 93), and it appeared that the Railroad used the track not only to serve M. & M. Turpentine Company and Mr. McKenzie but also other customers in the area (R. 64, 67, 99). Specifically, it is a well known geographical fact that the locality here involved is a great watermelon producing area, and in the late spring and summer tremendous quantities of watermelons are shipped out to markets all over the country. This spur track was used by the Railroad to accommodate these local watermelon producers as well as the M. & M. Turpentine Company (R. 64, 67, 93, 99). The track was used exclusively by the defendant Railroad's trains (R. 68).

The obligation of the M. & M. Turpentine Company to maintain the track was not an objective one, that is, there were no concrete standards prescribed or any blue prints or detailed specifications concerning the track's maintenance of any sort. The Turpentine Company's obligation was simply to satisfy the Railroad's Chief Engineer (R.

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[5] The contract between the Railroad and the M. & M. Turpentine Company was produced by the Railroad and submitted to the trial Judge during argument on the defendant's motion for a directed verdict, but apparently from a review of the record was not formally introduced into evidence. The substance of the contract, however, was covered by the testimony of witnesses, and the contract itself appeared in the original record before the District Court attached to defendant's Answers to Interrogatories.

97). As testified by the Railroad's section foreman, the only specifications were that the track had to "be safe for the cars to roll on" and had to "come up" to what he felt was safe (R. 55).

Shortly before the accident here involved, the Railroad's section foreman inspected the McKenzie spur track in preparation for the watermelon season and found it to be defective (R. 64-65, 67, 70). He then contacted the Turpentine Company's president, D. P. McKenzie, and advised him that the track would have to be repaired (R. 69-70, 75). Mr. McKenzie asked the foreman to fix the track "in a way that the Coastline wouldn't have any objection to placing their trains out there," at his or his company's expense (R. 67, 64, 66). Foreman Keene agreed to do this, and on Friday, May 21, 1954, after his Railroad section crew had completed their regular five-day, forty-hour week (R. 72-73), he asked his crew if they would work on the McKenzie siding the next day on a voluntary basis to earn some extra money at regular Railroad overtime rates of pay (R. 56, 73, 69-70, 105). The crew agreed to perform this work, and on Saturday they all reported to work at the usual place, the Railroad tool shed (R. 15, 105); at the usual starting time, 7 a.m. (R. 15, 55); took their regular Railroad tools (R. 82-83, 115, 16, 105, 67, 56); and went to the McKenzie siding where they proceeded to repair the track under the supervision, direction and control of their section foreman, Keene, working just as they did during the week (R. 67, 76-77, 16-17). The tools were used pursuant to authorized Railroad policy (R. 97), it being an established practice for the gang to work on privately owned sidings on weekends under the supervision of their foreman (R. 11-12, 35, 97, 92, 54, 77).

The repair work being done on the spur track was the replacement of approximately 19 railroad ties underneath

the track (R. 56, 67, 69, 75). Prior to the arrival of the gang at the track that Saturday morning, Mr. McKenzie had arranged to have his saw mill deliver new ties at the places where section foreman Keene had told him the ties had to be replaced (R. 75). The only other materials needed were spikes, which the crew took from the old ties and used over again (R. 76).

While according to the foreman, Mr. McKenzie was present at the siding when the gang first arrived (R. 63), the foreman admitted that McKenzie did not attempt to supervise or control the manner of doing the work since "he said that he knew that I knew more about it than he did" (R. 64), and he left very shortly after the work got under way (R. 64). The section foreman then proceeded to fix the track to satisfy himself as the Railroad's representative (R. 64, 55, 97). It was during the course of this work that the plaintiff was hurt (R. 17-19, 107, 109, 114, 117).

The crew's wages for the time involved in repairing the spur track were paid at time-and-one-half of their regular Railroad rate, or in other words at the usual overtime scale (R. 56-57, 67, 14, 21). The wages were paid by check given to section foreman Keene by Mr. McKenzie. Keene cashed the check at a local bank and paid the individual crew members in cash (R. 56-58, 65-67). The crew's ordinary Railroad wages were paid twice monthly by Railroad check (R. 77, 112).

There was a marked, clear-cut conflict in the evidence concerning what section foreman Keene told the crew about this particular work before beginning it and also concerning his knowledge of petitioner's injury. Thus, plaintiff testified that he and the crew were "told" by their section foreman to report to work on Saturday to repair the McKenzie siding and that they would be paid overtime for their labor (R. 14-15). He testified that he knew the spur

was called the McKenzie siding but that he did not actually know who owned it, and that he understood that he was working for the Railroad when his back "popped" and he got hurt (R. 29, 32, 35, 17-19). Being unable to straighten up, plaintiff went over to the foreman, reported his injury, and then proceeded to his home on foot, taking almost two hours to walk the distance of a mile in his bent over position (R. 19-20). On arrival home, he went to bed and stayed in bed the rest of the day while his wife summoned a doctor who prescribed a "kidney plaster" (R. 20-21, 87-89). Later that afternoon, according to both plaintiff and his wife, section foreman Keene came to their house, gave plaintiff's wife his pay for the day's work in cash, and talked to plaintiff from the door of his bedroom (R. 89, 21). Eventually plaintiff was admitted to the Railroad hospital in Waycross, Georgia, for more extensive treatment (R. 23).

Foreman Keene, on the other hand, testified that he positively told the crew "when we got on the job" that they were on a private track and that the Railroad was not responsible for them (R. 69), but that he was not sure whether or not he had told them such information on the previous afternoon (R. 70). He denied having any knowledge of petitioner's getting hurt that morning or leaving the job (R. 56-57, 61, 78), and testified that he later that day twice saw petitioner walking around the town of Chiefland with no apparent injury, and that on one such occasion he paid petitioner his pay for the day's work (R. 65, 57-58). He admitted that petitioner did not report for work the following Monday as usual, but stated that this was explained to him on Saturday by petitioner as being due to the fact petitioner's wife was pregnant (R. 58). Petitioner's subsequent admission to the Railroad hospital was apparently attributed by Keene to petitioner's having been hurt while playing baseball (R. 60-61, 78-80). In short,

the foreman denied all knowledge of the injury and admittedly filed no report with the Railroad concerning it (R. 78, 61, 137-138).

Two of the four colored section hands who were still with the Railroad at the time of trial also testified as Railroad witnesses (R. 104-111, 112-118). Both confirmed that petitioner got hurt that Saturday morning and walked off the job (R. 107, 114, 117). Both also testified that "the boss man" had asked them on the Friday afternoon before the accident if they wanted to make some extra time and some extra money by working on a private track, that they all agreed at that time to do so (R. 105, 113), and that they were specifically and especially warned by their foreman that Saturday morning that "you are not working for the Coastline now and you want to be sure that you don't get hurt" (R. 117).

With the evidence in this condition, the trial Judge submitted the employment issue to the jury on the simple basis that petitioner's employment status depended entirely upon what his foreman had told him, regardless of who controlled and supervised the work, charging (R. 145-146):

> "The issue in this case is whether or not Ward was aware of the fact that he was not working for the Railroad, but was working for the owner of that private track when he went to work that morning."

And (R. 152):

> "That the Railroad Company was liable unless the defendant's foreman made it clear to him before he started to work that morning that they were not working for the Railroad, but working on a private track to make some extra money."

During the charge conference[6] with the trial Judge, the Judge had made it clear that he was not going to submit the case to the jury on either of plaintiff's alternate theories of the case and had specifically rejected plaintiff's requested charges #2, #4, #5, and #6 which embodied those contentions, while noting, of course, plaintiff's objection to such ruling (R. 154-155, 141-143). During the giving of his charge, however, it seemed to plaintiff that the Judge was committing additional error, even under the Court's theory of the case, by charging that the question turned on whether plaintiff knew that the track was a "private track" or not (R. 145-146). Accordingly, plaintiff made additional objection to the charge at its conclusion on this further ground (R. 151-152), but by no means was such action intended or should it be construed as an abandonment of plaintiff's basic position as expressed and embodied in its requested charges and the legal authorities submitted in their support (R. 154-155).

Summary of Argument

Petitioner's argument is basically two-fold, each part involving the principles of two recent FELA decisions of this Court: *Sinkler* v. *Missouri-Pacific Railroad Company* (1958), 356 U.S. 326, and *Baker* v. *Texas and Pacific Railway Co.* (1959), 359 U.S. 227.

I.

Under the undisputed facts of this case, petitioner as a matter of law was an employee of the respondent Railroad when injured for the following reasons:

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[6] The charge conference was considerably more lengthy than is indicated by the brief report in the record (R. 141-143), which is merely a report of the final outcome of the conference and a formal record of plaintiff's and defendant's objections to the Court's refusal to grant their requested charges (R. 143).

A. The M. & M. Turpentine Company by obligating itself to the Railroad to maintain the spur track to the satisfaction of the Railroad's Chief Engineer necessarily submitted itself to the control and supervision of the Railroad and accordingly, even under pre-*Sinkler* decisions, became an agent for the Railroad in the performance of this work. The Railroad used this spur track in interstate commerce as a part of its total system to service many customers in the area. It had a non-delegable duty to its shippers, its passengers, and to its employees to see that this track was maintained properly, regardless of who owned the track. It passed this obligation on to the M. & M. Turpentine Company but reserved to itself such control that under basic common law principles the M. & M. Turpentine Company became the Railroad's agent. The M. & M. Turpentine Company had no objective standards by which to maintain the track independently and hence had to follow Railroad control in order to fulfill its obligations to satisfy. The basic factor of control is decisive here and therefore the petitioner legally remained in the Railroad's employ regardless of what he was given to understand by his section foreman. He was either working for the Railroad directly or was working for the Railroad's agent. In either case, he was covered by FELA.

B. Under the *Sinkler* decision, the M. & M. Turpentine Company clearly became the agent of the Railroad as a matter of law even if the Railroad did not reserve to itself sufficient control to render such company its agent under the common law. *Sinkler* holds that where a Railroad delegates its "operational activities" to another company by contract, such other company for the purposes of FELA becomes the agent of the Railroad regardless of traditional common law considerations. Ordinary maintenance of a track used by a railroad in interstate commerce to serve

local producers, as distinguished from major overhaul or new construction, is an operational activity of the railroad. Having agreed to perform this operational activity for the Railroad and to the Railroad's satisfaction, the M. & M. Turpentine Company became the Railroad's agent, and as such, its employment of the Railroad's regular employees to work on the track would not legally destroy under FELA their status as Railroad employees. The rationale as well as the specific holding of *Sinkler* here applies.

C. Section 5 of FELA outlaws any device designed to escape liability under FELA. Here, the Railroad has created an elaborate scheme the effect and obvious purpose of which is to avoid liability under FELA. Thus, the Railroad first obligates its customers to maintain tracks which form part of its total system to the Railroad's satisfaction; the Railroad then through its section foreman supplies its regular section gang, equipped with Railroad tools, to the customer to perform the necessary work at the customer's expense, the foreman being most careful to specify that the crew will not be working for the Railroad and warning them "not to get hurt" because the Railroad will not be responsible. The consequence is that a regular Railroad worker, injured in the course of such employment, receives neither workmen's compensation nor the benefits of FELA, as happened here. The Railroad gets the obvious benefit of uniform maintenance work on its entire system, done under its control and to its satisfaction with its own employees and tools, but without the corresponding burden of FELA liability, workmen's compensation, or any other type of employee protection. Here, if the Railroad itself had paid the crew and billed the Customer for the cost of the work, FELA coverage would be obvious. The fact that the Railroad's section foreman instead billed the Customer and paid the crew in cash should make no difference. The

coverage of FELA should not depend on form rather than substance.

II.

The *Baker* case held that the question of whether an employee, in performing extraordinary railroad maintenance work, was working for an independent contractor not under FELA or was working for an agent of the railroad under FELA was a matter of Federal law and was to be determined according to the ordinary rules governing this familiar legal problem. While no one feature of the relationship is absolutely determinative, the element of control is the most significant. Since each case necessarily differs from another on its own peculiar facts, the question under Federal law is ordinarily one for the jury to decide under appropriate instructions as to the various relevant factors legally applicable. In this case petitioner duly requested the trial Judge to so submit the question to the jury under an appropriate instruction which described those various relevant factors. In denying that request, and in submitting the question to the jury solely upon the basis that petitioner's status was determined by what his foreman told him, the trial Court erred and ruled contrary to the *Baker* decision. What the parties believe or express their relationship to be does not necessarily determine it, where the actual realities are otherwise. While failure to obtain petitioner's consent to his being "lent to" or "borrowed by" the Railroad's customer would legally require a holding that he remained the Railroad's employee, the converse is not equally true. Thus, a servant may be told he is being lent and consent to it, but nevertheless remain actually and in fact under the control and therefore in the employ of his original master.

Argument

I. On the Undisputed Facts of This Case, Petitioner Was an Employee of Respondent Railroad as a Matter of Law When Injured. The Trial Court Therefore Erred in Denying Petitioner's Request for a Peremptory Charge on the Employment Issue.

At the conclusion of the trial, petitioner duly requested the following peremptory instruction on the employment issue (R. 155):

> "The Court charges you as a matter of law that the plaintiff, Raymond P. Ward, was employed by the defendant railroad at the time he was injured."

The Court rejected this request (R. 155, 141), and instead submitted the employment issue to the jury solely and exclusively on the Court's theory that plaintiff's employment status when hurt depended entirely upon whether or not petitioner's railroad foreman told him he was not working for the Railroad but for somebody else that Saturday morning (R. 145-146, 152-153).

While the trial Court's theory has an engaging simplicity about it, petitioner respectfully submits that it ignores and conflicts not only with basic common law principles but more significantly with applicable decisions of this Court and a long line of lower federal court decisions concerning FELA. Under these governing decisions, petitioner was on the *undisputed* facts of this case an employee of the respondent Railroad when injured for the following reasons:

A. The M. & M. Turpentine Company Was Respondent Railroad's Agent in Performing the Work Here Involved Because the Power to Control the Work Was Reserved by the Railroad.

While there was a severe conflict in the evidence concerning what section foreman Keene had told petitioner about his status while working on this spur track, there was no conflict whatsoever in the evidence concerning the relationship between the respondent Railroad and the M. & M. Turpentine Company. Indeed, all of the evidence concerning this latter relationship came either from foreman Keene or the Railroad's own witnesses.

Under this undisputed evidence, it appeared that the Railroad used the spur track here involved in interstate commerce and used it not only to serve the M. & M. Turpentine Company but to serve local agricultural producers in the area also. In short, the spur track tied into the Railroad's main line, was partly owned by the Railroad, and was used by the Railroad as a part of its total system. It was not, in other words, a purely private track.

Being a part of the Railroad's system, the track and its maintenance were necessarily a matter of concern and responsibility to the Railroad. For example, the Railroad has a non-delegable duty to its employees to furnish them a safe place in which to work. This duty exists regardless of whether the track or place involved is owned by the railroad or by its customer. See *Ryan* v. *Twin City Wholesale Grocer Co.* (1941), 210 Minn. 21, 297 N.W. 705. Thus a railroad is liable to its employees for injuries caused by a defective or obstructed spur track even though (as here) the spur runs over private land and the railroad has delegated the duty of maintenance to the owner. *Ruddy* v. *New York Central Railroad Co.* (CA 2, 1955), 224 F.2d

96, cert. den., 350 U.S. 884; *Terminal R. Assn. of St. Louis* v. *Fitzjohn* (CA 8, 1948), 165 F.2d 473. The Railroad obviously has comparable non-delegable duties to its shippers and its passengers to see to it that the tracks upon which it operates, regardless of ownership, are safe. In brief, the proper maintenance of this spur track here involved was not a matter of indifference to the Railroad. The Railroad's rules themselves quite properly reflect its interest in the safe condition of such tracks as these by imposing at least the duty to inspect all privately owned tracks within his section on the section foreman (Pl. Ex. #1; R. 12-14).

Being concerned about the proper safety and maintenance of this spur track, the Railroad chose to impose by contract the express obligation on its customer, the M. & M. Turpentine Company, to maintain the track "*to the satisfaction of the Chief Engineer of the Atlantic Coastline Railroad*" (R. 97). Such an arrangement necessarily reserved in the Railroad the power to control *how* the track should be maintained. In other words, the customer here did not contract to perform a specified and described piece of work according to objective standards. This was not a contract to produce a given result according to agreed-upon plans, blueprints, or specifications leaving the contractor free to employ any means he might choose to accomplish the end result. Rather, it was a contract to maintain continuously a piece of track—how?—to the satisfaction (whatever that may be) of the Railroad's Chief Engineer. A more obvious agency relationship could not be described. The M. & M. Turpentine Company could not possibly act independently from the Railroad in performing such work. As shown by the evidence, the president of the turpentine company, when advised that the track needed repair, simply told the Railroad's foreman to fix the track "in a way that the Coastline wouldn't have any

objection to placing their trains out there" (R. 67) and that "he knew that I [the foreman] knew more about it than he did" (R. 64). Under the existing arrangement, the president had no choice and could say nothing else since all the power to control was in the Railroad.

This lack of detailed plans or objective specifications, coupled with the obligation "to satisfy" the railroad, has previously been considered in precisely this context of determining whether a contractor with a railroad was under FELA an independent contractor or the railroad's agent. In *Cimorelli* v. *New York Central R. Co.* (CA 6, 1945), 148 F.2d 575, the plaintiff was an admitted and regular employee of the Duffy Construction Company which had contracted with the defendant railroad to perform certain loading operations for the railroad. There, as here, the contract was general and indefinite, and further required that the work be done to the satisfaction of the railroad. In deciding that the plaintiff was as a matter of law an employee of the railroad under FELA, the Court referred to these circumstances as showing that the railroad actually was in control of not only what was done, but how it was done, and accordingly was the true or ultimate employer, the contractor being a mere agent of the railroad.[6a]

[6a] See also *Pennsylvania R. Co.* v. *Barlion* (CA 6, 1949), 172 F.2d 710, and *Pennsylvania R. Co.* v. *Roth* (CA 6, 1947), 163 F.2d 161, cert. den., 332 U.S. 830, where the general and indefinite nature of the contract between the railroad and the contractor necessitated detailed supervision by the railroad, thereby creating an agency relationship under FELA. In attempting to distinguish these cases and the *Cimorelli* case from the instant case, the Court of Appeals below stated (R. 169) that in none of them had the parties "expressly negated the existence of the legal relation which the circumstantial evidence established as a matter of fact or of legal construction." In this regard petitioner respectfully submits the Court erred since *Cimorelli* involved a contract that expressly stated the contractor was an independent contractor, and in all three cases, *Cimorelli, Barlion* and *Roth,* the employee involved was a regular employee of the contractor, not the railroad, and so of course understood he was working for the contractor.

Indeed, this duty to satisfy has even been held to outweigh express provisions in a contract negating control by the railroad and stating that the contractor shall be an independent contractor. *Cimorelli* v. *New York Central R. Co., supra; Wabash RR. Co.* v. *Finnegan* (D.C. Mo., 1946), 67 F. Supp. 94, 99-100, app. dism'd, 160 F.2d 891.

By the same token, the presence of detailed, objective plans and specification in a contract between a railroad and a third party is most indicative and persuasive in a FELA suit that the relationship is a truly independent contractor one. *Tinsley* v. *Massman Const. Co.* (Mo., 1954), 270 S.W.2d 835.

In summary, petitioner here submits that the undisputed evidence of this case conclusively shows that the Railroad not only retained the power to control the manner of performing this maintenance work, but that it actually exercised this power to control through its foreman who supervised the work and saw to it that the Railroad was satisfied. Having retained and exercised this power of control and supervision, the Railroad must in law be deemed to have appointed and utilized the M. & M. Turpentine Company as its agent. The factor of control and supervision over the work is decisive in holding the Railroad here as the actual and legal employer. See *Linstead* v. *Ches. & Ohio Ry.* (1928), 276 U.S. 28; *Railroad Company* v. *Hanning* (1872), 15 Wall. 649, 82 U.S. 649; *Cimorelli* v. *New York Cent. R. Co.* (CA 6, 1945), 148 F.2d 575; *Pennsylvania R. Co.* v. *Barlion* (CA 6, 1949), 172 F.2d 710; *Pennsylvania R. Co.* v. *Roth* (CA 6, 1947), 163 F.2d 161, cert. den., 332 U.S. 830; *Halderman* v. *Pennsylvania R. Co.* (CA 2, 1931), 53 F.2d 365; *Byrne* v. *Pennsylvania Railroad Company* (CA 3, 1958), 262 F.2d 906, cert. den., 359 U.S. 960; *Wabash RR. Co.* v. *Finnegan* (D.C. Mo., 1946), 67 F. Supp. 94, app.

dism'd, 160 F.2d 891; *Downs* v. *Baltimore & Ohio R. Co.* (1951), 345 Ill. App. 118, 102 N.E.2d 537, 30 A.L.R.2d 503.

B. Under the *Sinkler* Decision, the M. & M. Turpentine Company Became the Agent of the Railroad for the Purposes of FELA Regardless of the Control Reserved or Exercised by the Railroad.

The decision of this Court in the case of *Sinkler* v. *Missouri-Pacific Railroad Company* (1958), 356 U.S. 326, is clearly a land-mark case in the ample history of FELA litigation. By its terms, the relationship under FELA between a railroad and a third party hired by the railroad to perform railroad operational activities does not turn upon the nice, common-law distinctions (frequently obscure in individual cases) between an agency relationship and an independent contractor relationship. For purposes of FELA a person engaged in either capacity by the railroad to perform operational activities is deemed in law to be the railroad's agent.

This case, admittedly and quite obviously, does not arise in precisely the same posture as the *Sinkler* case. In *Sinkler* the injured plaintiff was concededly an employee of the defendant railroad; here it is not so conceded. In *Sinkler* the delegated or contracted activity was the switching of cars; here it is the maintenance of track.

Despite these differences, petitioner submits that the holding and rationale of the *Sinkler* case requires a holding in this case that petitioner did not lose his status as a railroad employee under FELA by going to work for the M. & M. Turpentine Company on this spur track. For here, as in *Sinkler*, the petitioner was engaged in furthering the task of the railroad's total enterprise and comes clearly within the class and category of workers Congress sought to protect by FELA. It is submitted that where a contrac-

tor has been engaged by the railroad to perform regular and normal railroad work and the contractor uses regular railroad employees in the task, such employees as a matter of law should retain their status under FELA as railroad employees, regardless of whether the relationship between the railroad and the contractor is one of agency or of independent contractor, as tested by common-law principles. Every reason in *Sinkler* for giving a broader-than-common-law construction to the word "agent" in Section 1 of FELA applies with equal force here for holding that the M. & M. Turpentine Company was as a matter of law the Railroad's agent in using the Railroad's employees to maintain this track pursuant to its contract obligation to the Railroad.

A holding to this effect has at least been intimated already by an Illinois court. Thus, in *Downs* v. *Baltimore & Ohio R. Co.* (1951), 345 Ill. App. 118, 102 N.E.2d 537, 30 A.L.R.2d 503, the railroad engaged an allegedly independent contractor to perform certain regular loading operations previously performed by railroad employees, and then proceeded to transfer its regular employees to the contractor's payroll. The Court, in affirming the trial court's peremptory instruction to the jury on the employment issue, ruled as a matter of law that the contractor's employees were eligible to sue the railroad under FELA for injuries received in the course of their work, the contractor being an agent of the railroad.

Likewise, the Court of Appeals for the Seventh Circuit has expressly stated in *Miles* v. *Pennsylvania R. Co.* (CA 7, 1950), 182 F.2d 411, 414, that:

> "Admittedly the defendant [railroad] could not have escaped the liability imposed by this Act [FELA] by contracting with a contractor to take over *the ordinary and necessary maintenance work on track which it used in interstate commerce.*"

The Court there distinguished such ordinary and necessary maintenance work from new construction, extraordinary repairs or major overhauls, which could reasonably be expected to be contracted out by the railroad. Compare *Dougall* v. *Spokane, P. & S. Ry. Co.* (CA 9, 1953), 207 F.2d 843, cert. den., 347 U.S. 904, with *Erie R. Co.* v. *Margue* (CA 6, 1928), 23 F.2d 664. Certainly it would logically seem that regular and ordinary maintenance work is as much "operational activity" as the switching of cars or the giving of signals.[7] But in any event, as succinctly stated by Judge Rives in his dissenting opinion (R. 178):

> "Appellant was in the general employ of the Railroad. The services which he was performing at the time of his injury benefited the Railroad as well as the turpentine company. In my opinion, the appellant did not cease to be a Railroad employee when he accepted work on the siding used in the operation of the Railroad. In the maintenance and repair of the siding, I think that the turpentine company was as truly the 'agent' of the Railroad within the meaning of the Federal Employers' Liability Act as the Belt Railway was the 'agent' of the Missouri-Pacific in switching the latter's car in Sinkler v. Missouri-Pacific R. Co., 1958, 356 U.S. 326, 330."

Petitioner is not contending that regular employees of the turpentine company would necessarily become employees of the railroad simply and only because they do maintenance work on a company-owned track. But he is contending that regular employees of the Railroad do not lose their status as such by virtue of working on a system track doing work which the Railroad has required to be done by the Railroad's contractor.

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[7] Cf. *Atlantic Coast Line R. Co.* v. *Treadway* (1917), 120 Va. 735, 93 S.E. 560, cert. den., 245 U.S. 670.

C. Section 5 of FELA Requires the Legal Conclusion That Petitioner Did Not Lose His Status as a Railroad Employee by Working for the M. & M. Turpentine Company.

If the writings and protests of railroad counsel are any fair indication, the railroads feel much "harassed" by FELA and would much prefer a "reasonable" compensation act in its stead, if for no other reason (they say) than to prevent this Court's concepts and principles interpreting FELA from spreading "to permeate other branches of the law" as well. Wright, "The Employers' Liability Act: Does the Supreme Court Want It Repealed?" 45 Amer. Bar Assoc. Journal 151, 202. Such proposals, of course, are most appropriately addressed to Congress and presumably have been so addressed with due diligence since 1908. To date, however, the only Congressional reaction has been to expand the coverage of the Act within the railroad industry itself and to apply it to maritime employees as well. 53 Stat. 1404, 45 U.S.C. 51; 41 Stat. 1007, 46 U.S.C. 688.

Perhaps anticipating the Act's unpopularity with employers in the industry, Congress expressly provided in Section 5 thereof, 45 U.S.C. 55, that any contract, rule, regulation or device whatsoever designed to exempt a railroad from liability under the Act should be to that extent void. This provision quite obviously outlawed such unsubtle avoidance techniques as the general releases usually required at that time to be executed by all new employees.[8] Realizing this, the railroads attempted nevertheless to continue the use of such general releases, whenever possible, through the convenient device of hiring workers as "independent contractors" to whom Section 5 would not apply.

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[8] See, e.g., the general and prospective release involved in *Robinson* v. *Baltimore & Ohio R. Co.* (1915), 237 U.S. 84.

The attempt met with outstanding success in the 1916 decision of this Court holding that the surviving representatives of a man hired by the railroad to shovel coal and grade it according to size, who was killed in the course of his work allegedly through the negligence of the railroad, could not claim damages from the railroad because he was an "independent contractor" rather than an employee and accordingly had the privilege to sign a release and hold harmless contract when hired. *Chicago, R.I. & P.R. Co.* v. *Bond* (1916), 240 U.S. 449.

Blessed with such success, railroads since that time have delegated to independent contractors virtually every phase of the entire railroad operation from freight handling[9] and track laying[10] to cleaning up ashes from underneath a turn table[11] and the firing of locomotives.[12] In perhaps the most extreme case the entire railroad operation "down to the last paper clip" was delegated by the railroad to a sister corporation which then proceeded to contend that FELA did not apply. *Eddings* v. *Collins Pine Company* (D.C. Calif., 1956), 140 F. Supp. 623.

Despite the *Bond* decision, however, the railroads have not been entirely successful in contending that the independent contractor device automatically guarantees immunity from FELA. The leading post-*Bond* case upon the subject is *Erie R. Co.* v. *Margue* (CA 6, 1928), 23 F.2d 664, where the railroad delegated the responsibility of maintaining its entire right of way in the State of Ohio to a construction company as an independent contractor, and expressly

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[9] *Bugg* v. *Sanders* (1929), 219 Ala. 129, 121 So. 410.

[10] *Orange* v. *Pitcairn* (1935), 280 Ill. App. 566.

[11] *Polluck* v. *Minneapolis & St. L. R. Co.* (1918), 40 S.D. 186, 166 N.W. 641, cert. den., 248 U.S. 558.

[12] *Wabash R.R. Co.* v. *Finnegan* (D.C. Mo., 1946), 67 F. Supp. 94.

provided that the company must comply with the Ohio workmen's compensation laws. Holding that an obvious purpose of such arrangement was to substitute state compensation law for FELA, the Court of Appeals ruled that an employee of the contractor by virtue of Section 5 could nevertheless sue the railroad under FELA.

In light of this decision, the Ohio state court thereafter similarly ruled that the state compensation law did *not* apply or cover employees of an independent contractor engaged by the railroad to regularly maintain all of its rolling stock because they were covered by FELA. *Moore* v. *Industrial Commission* (1934), 49 Ohio App. 386, 197 N.E. 403.

An Illinois court has ruled to like effect in *Downs* v. *Baltimore & Ohio R. Co.* (1951), 345 Ill. App. 118, 102 N.E.2d 537, 30 A.L.R.2d 503, holding that to recognize a contractor engaged by the railroad to unload vessels, to whose payroll the railroad had transferred its employees, would violate Section 5. And while not directly there involved, the Court of Appeals for the Seventh Circuit has expressly stated that a railroad cannot escape FELA liability "by contracting with a contractor to take over the ordinary and necessary maintenance work on track which it used in interstate commerce." *Miles* v. *Pennsylvania R. Co.* (CA 7, 1950), 182 F.2d 411, 414.

Under these later and, it is respectfully submitted, better-reasoned decisions, petitioner contends that to hold the M. & M. Turpentine Company here to be an independent contractor whose employment of petitioner destroyed his status as a railroad employee under FELA would be a clear violation of both the meaning and purpose of Section 5. This is particularly true since this is not a case where the railroad simply delegated one of its activities to a contractor with non-railroad employees. Here, the

delegation has been accomplished so as to use regular railroad employees to perform their regular railroad work, but free from the burden of FELA liability. The obvious purpose is precisely such avoidance. Thus, the Railroad here first obligates its customers to maintain, to the Railroad's satisfaction, track which forms a part of its total system and which it admittedly uses in interstate commerce; next the Railroad through its section foreman supplies its regular section gang, equipped with Railroad tools, to the customer to perform the necessary work at the customer's expense, the foreman being most careful to specify to the crew that they are not then working for the Railroad and particularly warning them not to get hurt because the railroad will not be responsible.

The consequence of all this is simply that a regular railroad worker, injured in the course of his employment on the railroad, receives neither workmen's compensation nor the benefits of FELA, which is precisely what occurred in this case.

The Railroad, on the other hand, gets the obvious benefit of uniform maintenance work on its entire system, performed under its control and to its satisfaction with its own employees and tools, but without any "harassing" burden of FELA liability or even the "reasonable" liability of workmen's compensation.

Stripped down to its essentials, what happened here is very clear. The Railroad fixed this spur track to suit itself and charged the turpentine company the expense involved. Certainly if the Railroad here had itself paid its crew and formally billed the turpentine company for the cost, FELA coverage would be obvious. The fact that the Railroad's section foreman, instead, billed the customer and paid the crew in cash should make no difference unless mere form is to prevail over substance and reality.

II. The Trial Court Erred in Failing to Charge the Jury as Requested Concerning the Applicable Legal Factors Governing the Employment Issue.

Alternatively, petitioner contends that the ruling of the trial Judge and the holding of the Court of Appeals below is in direct and irreconcilable conflict with the recent decision of this Court in *Baker* v. *Texas and Pacific Railway Co.* (1959), 359 U.S. 227. In *Baker* an employee of an allegedly independent contractor engaged by the railroad to perform work on its right of way was killed during the course of his employment. His legal representative brought suit against the railroad under FELA claiming that the contractor was actually only an agent of the railroad since the railroad controlled the manner and details of the work. The Texas courts ruled as a matter of law that the deceased was an employee of an independent contractor and therefore the suit could not be maintained under FELA.

In reversing the case and remanding for a new trial, this Court ruled that the question under FELA was properly one for the jury to determine under appropriate instructions. The Court indicated that such appropriate instructions were the usual ones pertaining to whether an independent contractor or agency relation existed as indicated by the Restatement, Agency 2d, Section 220. In short, when the employment issue involves conflicting factual elements or inferences requiring its submission to the jury, the jury should be advised concerning the various distinguishing features which legally determine the nature of the relationship.

Petitioner in this case duly requested such appropriate instructions (Pl.'s Requested Instructions #'s 2, 4 and 5; R. 154-155). The trial Court rejected them on the ground

that they were not applicable in this case because the employment issue depended and turned entirely upon what the plaintiff's foreman told him before beginning work on the spur track. The Court of Appeals affirmed, likewise on the ground that if the foreman told petitioner he was not working for the Railroad this absolutely precluded a finding that he was nevertheless a Railroad employee. In so holding, the Court distinguished the *Cimorelli* v. *New York Central R. Co., supra,* decision and others involving employees of alleged independent contractors on the ground that (R. 169) " * * * in none of these cases were the courts dealing with an employee who had been expressly told beforehand that he would not be working for the railroad."

Petitioner respectfully submits that in so holding the Court below quite clearly erred.

In the first place, *Cimorelli* did involve a situation where the contract between the Railroad and the contractor expressly provided that the contractor was to have "exclusive supervision" of the manner and method of doing the work and was to be considered an "independent contractor." In other words, the railroad in *Cimorelli* indicated its unwillingness to enter into an employer-employee relationship with the plaintiff even more forcefully than did the Railroad here. Likewise, the employee there involved was hired and paid by the contractor *exclusively,* and was the contractor's regular employee rather than the railroad's. It was certainly just as clearly manifested to him that he was not intended to be a railroad employee as it was to petitioner here.

But in any event, the Court by placing controlling significance upon what the foreman said obviously overemphasized only one of the many factors which should have been submitted to the jury. Thus, the Restatement,

Agency 2d, Section 220, lists control over the details of the work as the very first, prime factor to be considered, and refers to the belief of the parties as to the nature of their relationship as merely the next-to-last, commenting:

> "It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission to control, by the other. * * * " Restatement, Agency 2d, Section 220, Comment m.

In short, what the parties believe or express their relationship to be does not necessarily determine it, where the true realities are otherwise. *Cimorelli* v. *New York Cent. R. Co., supra; Wegman* v. *Great Northern Ry. Co.,* 189 Minn. 325, 249 N.W. 422; *Marion Steam Shovel Co.* v. *Bertino* (CA 8, 1936), 82 F.2d 541, cert. den., 299 U.S. 556.

Petitioner of course contended below that if the foreman had failed to tell him that he would not be working for the Railroad, and he was asked or directed by his foreman to perform this work, then he necessarily remained in the employ of the Railroad on the principle that a servant may not be lent to or borrowed by another without his consent. *Chicago, R.I. & G. Ry.* v. *Trout* (Tex. Civ. App., 1920), 224 S.W. 472; *Terminal R. Assn. of St. Louis* v. *Fitzjohn* (CA 8, 1948), 165 F.2d 473.

But the converse of this contention does not hold true, and it does not follow that if he was so advised he must conclusively be deemed a non-Railroad employee. Thus, a servant may be told he is being lent and consent to it, but nevertheless remain actually and in fact under the control and therefore in the employ of his original master. Such apparently was the situation in *Marion Steam Shovel*

Co. v. *Bertino* (CA 8, 1936), 82 F.2d 541, cert. den., 299 U.S. 556.

Finally, if the Railroad here actually lent its regular employee to its agent, the fact it told the employee that he was working for the agent and not the Railroad would be a matter of complete insignificance. Being an employee of the Railroad's agent, petitioner would still retain the right to maintain his suit against the Railroad under FELA. *Baker* v. *Texas and Pacific Railway Co., supra.*

In summary, therefore, petitioner submits that under the *Baker* decision of this Court, the judgment rendered below should be reversed and the case remanded for retrial for failure of the trial Judge to submit the employment issue to the jury under appropriate instructions as requested.

CONCLUSION

For the foregoing reasons, both singly and in combination, petitioner respectfully prays that the judgment rendered below be reversed and the case be remanded to the District Court for a new trial with directions to instruct the jury that petitioner as a matter of law was in the employ of the respondent Railroad when injured; or in the alternative, with directions to instruct the jury concerning the proper and relevant factors determining his status.

Respectfully submitted,

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